

City of Detroit

CITY COUNCIL

DAVID D. WHITAKER
Director
(313) 224-4946

DIVISION OF RESEARCH & ANALYSIS
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 216
Detroit, Michigan 48226
(313) 224-4946
FAX: (313) 224-0368

PEGGY ROBINSON
Deputy Director
(313) 224-4946

TO: The Honorable Planning and Economic Standing Committee

FROM: David Whitaker, Director
City Council Research and Analysis Division Staff

DATE: June 12, 2009

RE: Marathon Petroleum Company

At the City Council's Planning and Economic Development Committee meeting of May 27, 2009, the Honorable Councilman Kwame Kenyatta requested the Research and Analysis Division (RAD) to draft a resolution revoking the tax abatement status of Marathon Petroleum Company was granted under the City of Detroit Development Agreement dated October 9, 2007 between the City of Detroit and Marathon Petroleum Company (Marathon). This request necessitates our offering of the following pertinent information that should be considered prior to City Council taking action on the resolution.

Brief History

After lengthy negotiations and considerable public discussions regarding the proposed \$1.5 billion expansion of Marathon's Southwest Detroit oil refinery facilities, the City of Detroit and Marathon entered into the development agreement whereby Marathon would be the recipient of a tax exemption under Public Act 328. The City Council passed a resolution that approved Marathon for tax exemption on all new personal property related to the "Detroit Heavy Oil Upgrade Project" (D-HOUP) in accordance with MCL 211.9f(3), which provides in pertinent part:

If the state tax commission determines that the new personal property subject to the exemption is owned or leased by an eligible business and that the eligible business is located in 1 or more eligible districts, the state treasurer, with the written concurrence of the president of the Michigan strategic fund, shall approve the resolution adopted under subsection (1) if the state treasurer and the president of the Michigan strategic fund determine that exempting new personal property of the eligible business is necessary to reduce unemployment, promote economic growth, and increase capital investment in this state.

Prior to the approval City Council held a number of public discussions with representatives from Marathon, and representatives from the Southwest Detroit community. The public discussions addressed issues regarding the scope of the project including the environmental impact, the necessity to create new employment opportunities for the City residents and particularly job opportunities for the economically depressed Southwest Detroit community in the 48217 zip code.

The Agreement

While public discussions may have addressed specific employment opportunities for Southwest Detroit, the Agreement is not so specific. The Agreement provides for the approval of the 100% exemption of *ad valorem* taxes on new personal property at the facility and Marathon's commitment to maintain the number of regular full time jobs specified in Sections 2(a)(ii) and (iii) during the term of the exemption. Section 2(a) Job Creation provides:

The company will create temporary construction worker jobs through its independent third party contractors, and new regular full-time jobs at the Detroit refinery and the adjacent Facility as set forth below:

- (i) Temporary Construction Worker Job Creation. As part of the D-HOUP investment, the Company will require various construction workers to construct, assemble, and install new and upgraded industrial refinery processing units, machinery and equipment at the Detroit Refinery and the adjacent Facility. In carrying out the D-HOUP investment, the Company will engage general contractors and subcontractors that will employ various construction workers ranging from an approximate average 800 to 1200 workers for on-site construction and off-site fabrication of new and refurbished refined equipment during the construction phase of the D-HOUP investment.
- (ii) Regular Full-time Job Creation by the Company. As part of the D-HOUP Investment, the Company will create at least 60 regular full-time jobs to be located at the Detroit Refinery and the adjacent Facility.
- (iii) Regular Full-Time Job Creation by the Company's Independent Third Party Contractor. As part of the D-HOUP investment, approximately 75 regular full-time contract jobs will be created at the Detroit Refinery and the adjacent Facility. The estimated 75 regular full-time contract jobs to be created will be employees of the Company's Independent third party contractors, not the Company directly.

A reading of Section 2(a)(i), indicates for the period of construction Marathon will generate an average of 800 to 1200 temporary workers for on-site construction and off-site fabrication of new and refurbished refined equipment. The Human Rights Department (HRD) has been monitoring the progress of the construction jobs created. However, as indicated by Marathon and confirmed by HRD, approximately 10% of the construction project has been completed. Based upon the fact that 90% of the project has yet to be completed, it would be both premature and grossly inaccurate to conclude that Marathon has failed to meet its obligation under Section 2(a)(i) today.

The Agreement provides language in Section 2(b) that states:

The Company shall use commercially reasonable efforts to retain the jobs created in Section 2(a)(ii) and (iii) of this Agreement for the entire Exemption Term, including 320 regular full-time jobs at the Detroit Refinery. Provided however, that in recognition of the specialized nature of the Michigan Refinery industry, the Company shall be deemed in compliance with the provisions of this Section, so long as, the Company maintains a minimum number of regular full-time jobs at the Detroit Refinery that is not less than 80% of the number of regular full time jobs identified in the preceding sentence. (Emphasis added)

This language indicates Marathon would be in full compliance with Section 2(a)(ii) and (iii) as long as they maintain at least 256 of the 320 regular full-time jobs at the Detroit Refinery. HRD has been monitoring the temporary construction jobs and is in the process of determining whether Marathon has maintained 80% of original number of full time jobs. RAD notes, **there is no specific language in the agreement requiring Marathon to provide employment opportunities to those living in the Southwest Detroit community also referred to as the 48217 residents.** The Agreement does address particular methods and processes for compliance with environmental laws and commitments from Marathon regarding its environmental footprint on the Southwest Detroit Community and the 48217 area under Section 6¹.

In addition the Agreement provides that Marathon is to comply with the Living Wage Ordinance², Prevailing Wage Requirements³, and Executive Orders number 2007-1 and 2003-4.⁴ In accordance with the Agreement, the Executive Order applies to the jobs created in accordance with Section 2(a)(ii). Marathon is required to use commercially reasonable efforts to comply with the executive orders. Pursuant to Section 5, Marathon

¹ Section 6, Company Compliance with Environmental Laws & Environmental Commitments.

² Living Wage Ordinance, Chapter 18, Article 5, Division 6 of the Detroit City Code.

³ Prevailing Wage Ordinance, Chapter 18, Article 5, Division 6 of the Detroit City Code

⁴, Chapter 18, Article 5, Division 4 of the Detroit City Code.

shall be deemed to have used commercially reasonable efforts" by implementing the following:

- (a) Conduct a job fair sponsored by the Company and its independent third party contracts, in coordination with the Detroit Workforce Development Department, to provide qualified City residents with the opportunity to fill temporary construction worker jobs and regular full-time jobs created by the Detroit Heavy Oil Upgrade Project.
- (b) Work with the Detroit Workforce Development Department in consultation with other industrial businesses, trade unions or other industrial organizations or associations, doing business or located in the City, to develop technical training curriculum ("Training Program") at an educational institution, vocational school, or technical training facility located within the City, mutually agreeable to both the City and the Company.
- (c) Upon development of the Training Program, the Company will fund scholarships for up to ten (10) City residents to participate in the Training Program annually, for a period of not less than ten (10) years beginning January 1, 2008, or as soon as practical thereafter.

RAD contacted the Department of Workforce Development (DWD) to determine whether Marathon had performed as required. RAD was informed that Marathon has and continues to work with DWD in providing job fairs as required under the contract. It was also indicated that Marathon has worked with DWD in developing the technical training program as well as providing the scholarships for City residents. Pursuant to the Agreement, Marathon will be deemed to have put forth the requisite commercially reasonable efforts to comply with the Executive Orders if it has conducted the job fairs, training program; and funded scholarships. Based upon the information obtained, it appears Marathon is in compliance with the Executive Orders as required under the Agreement.

Breach of Contract

The Agreement provides that Marathon will be deemed in default if any of the following events occur:

Section 11. Default of the Company.

- (a) The Company fails to meet the job creation requirements set forth in Section 2(a)(ii) of this Agreement.
- (b) The Company fails to comply with the job retention requirements set forth in Section 2(b) of this Agreement.

- (c) The Company fails to provide the City with the information required to be provided to the City in the Employment Status Report required under Section 7 of this Agreement⁵, or as otherwise may be necessary for the City to verify compliance by the Company with its obligations under this Agreement.
- (d) The Company fails to use commercially reasonable efforts to comply with Section 5 of this Agreement.
- (e) The Company fails to comply with Section 6 of this Agreement.

In accordance with Section 11(a), a default occurs if Marathon fails to meet the job creation requirements set forth in Section 2(a)(ii) in the creation of 60 full time jobs at the current refinery and the adjacent facility. However, this provision requires the completion of the project to determine compliance. In addition, compliance with section 2(b) rectifies any non-compliance of Section 2(a)(ii).

With regard to a default under Section 11(B), requiring compliance with Section 2(b), it is unknown at this time whether Marathon has retained 80% of the 320 employees at the refinery facility. As previously indicated HRD is obtaining that information. In reference to Section 11(c), HRD has indicated that Marathon has consistently provided the Employment Status Reports required under Section 7 of the Agreement.

A default under Section 11 (d) would require a failure to use commercial reasonable efforts to comply with Section 2(a)(ii). As previously indicated commercially reasonable efforts are deemed satisfied if Section 2(b) is met by retaining 80% of the 320 full time employees. Therefore, by retaining 80% of the current 320 employees there is no default under Section 11 (a) or (b) or (d).

Section 11(e) deals with a failure to comply with Section 6 regarding environmental compliance and commitments made by Marathon. RAD has been unable to ascertain whether Marathon is in full compliance with all the provisions of Section 6, or which department has been specifically monitoring compliance.

While the Agreement provides the events constituting a default, a default does not occur until the following:

- (1) Written notice is provided to the Company by the City of such an event of default, and
- (2) The Company fails to initiate corrective action within thirty (days) following the date of receipt of such written notice of the event of default, and the Company fails to complete such correction action within ninety (90) days after such date of receipt.

⁵ Section 7, Annual Employment Status Report by the Company.

Since the passage of the tax exemption and execution of the Agreement, City Council has conducted several public hearings regarding the recruitment, employment and training of the temporary construction workers. Also addressed at the discussions have been the environmental concerns of the Southwest Detroit Community related to the project. The common denominator of all the public discussions has been the issue of whether Marathon has lived up to its promises and commitments. From a legal perspective, Marathon is only obligated to meet the obligations set forth in the Agreement negotiated and executed by the parties. If it is determined that Marathon is in default of the Agreement, notice by the City, in accordance with the provisions of the agreement must be provided. Section 24 sets forth the procedure for all notices:

Section 24. Notices All notices, request, demands, directions, declarations and other communications provided for herein shall be in writing and shall, except as otherwise expressly provided, be mailed by registered or certified mail, return receipt requested, or telegraphed, sent by facsimile transmission, or delivered by hand to the applicable party at its address indicated below.

If the appropriate notice has not been provided, no official default has occurred and Marathon has not been provided the requisite notice to take corrective action. If appropriate notice has been provided and Marathon has failed to cure the default, the Agreement provides remedies regarding specific types of breaches.

Section 12 Remedies for Company Default.

- (a) In the event of a default under Section 11(a) or Section 11(b) of this Agreement, the Company agrees to pay the City an amount equal to the difference between the amount of *ad valorem* tax otherwise due on the Facility without the P.A. 328 exemption, and the amount of the taxes due on the Facility as exempted, for the calendar year preceding the Employment Status Report, multiplied by a fraction, the numerator of which is the shortfall in the number of new and retained full-time employees indicated in the Employment Status Report, and the denominator of which is the total number of new and retained regular full-time employees set forth in Sections 2(a)(ii) and 2(b) of this Agreement.
- (b) In the event of a default under Section 11(c), (d) or (e) of this Agreement will result in the City, in its sole discretion, requesting that the Michigan State Tax Commission reduce the remaining Exemption Term or revoke the P.A. 328 exemption for the Company. Prior to taking any such action, the City must afford the Company to present at

a public hearing the reasons for any event of default by the Company pursuant to Section 11(c), (d) or (e) of the Agreement.

Therefore, according to the Agreement, the City's remedy if the default is due to Marathon's failure to meet the job creation requirements under Section 2(a)(ii) and (iii) or a failure to comply with the job requirements under Section 2(b) is limited to the damages as calculated under Section 12(a). If Marathon's default is due to a failure to provide the Employment Status Reports under Section 7; fails to use commercially reasonable efforts under Section 5; or fails to comply with Section 6 in complying with environmental laws and commitments, the remedy is limited to reduction or revocation of the tax exempt status after an opportunity to present reasons for the failure at a public hearing.

RAD believes that prior to City Council's passage of a resolution requesting the Michigan State Tax Commission's revocation of Marathon's tax exemption the Law Department should provide City Council with information that clearly delineates the factual evidence which establishes Marathon's breach/default and states whether proper notice of any default under the Agreement has been provided which triggers the applicable remedies.

If RAD can be of any further assistance regarding this matter, please feel free to call upon us.